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# PAST PERSECUTION STANDARD FOR ASYLUM ELIGIBILITY IN THE SEVENTH CIRCUIT: BYGONES ARE BYGONES

## INTRODUCTION

Give me your tired, your poor, [y]our huddled masses yearning to breathe free, [t]he wretched refuse of your teeming shore. Send these, the homeless, tempest-tost to me, I lite my lamp beside the golden door.<sup>1</sup>

So beckons the lady who keeps watch at New York Harbor, the symbolic gateway to the United States. Since its inception, the United States has been viewed by its residents, as well as by countless peoples around the world, as the land of opportunity. For many, the opportunity perceived here has not been merely an opportunity to prosper economically, but, more significantly, an opportunity to escape harsh treatment at home.

With the accession of the United States to the United Nations's 1967 Protocol Relating to the Status of Refugees ("Protocol")<sup>2</sup> and with the passage of the Refugee Act of 1980 ("Refugee Act"),<sup>3</sup> those persecuted at home because of race, religion, nationality, membership in a social group, or political opinion have had reason to seek freedom from oppression at home by pursuing asylum in the United States. Where the conditions in their countries have changed, however, so that they are no longer able to establish the likelihood of continued persecution, the opportunity to escape their troubled past has, in U.S. courts, proven illusory.<sup>4</sup>

This Comment will discuss cases from the Court of Appeals for the Seventh Circuit and from other federal circuit courts involving asylum claims based on past persecution and changed conditions,

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1. Emma Lazarus, *The New Colossus: Inscription for the Statute of Liberty, New York Harbor* (1883).

2. Protocol Relating to the Status of Refugees, January 31, 1967, 19 U.S.T. 6224 [hereinafter Protocol]; see *infra* notes 53-57 and accompanying text (discussing the legislative history of the Protocol).

3. Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended in scattered sections of 8 U.S.C.).

4. See *infra* notes 119-239 and accompanying text (discussing court decisions denying asylum claims based on past persecution and involving changed conditions).

and will establish that the decisions in those cases are contrary to the results contemplated by the United Nations and by Congress. This Comment is divided into three substantive sections. The Background begins with an outline of the asylum process in the United States, and then explores the eligibility requirements for a grant of asylum, including a historical overview of the definition of a refugee,<sup>5</sup> a definition of persecution, and comments on the discretionary nature of asylum.

The next substantive section discusses the effect a change in an alien's country of origin has on his asylum eligibility. This section first sets forth both the United Nations's and the United States's positions on an alien's asylum eligibility in light of changed conditions in his country of origin. A discussion comparing both positions shows them to be identical in substance. To illustrate the similarity between the two positions with respect to an alien's asylum eligibility, subsequent to a change of conditions in his country of origin, the section also examines the administrative decision in *In re Chen*,<sup>6</sup> where an alien received asylum despite changed conditions in his country. Finally, the section reviews recent Seventh Circuit decisions involving asylum claims based on past persecution, and notes the positions of other circuits which have considered the issue of past persecution asylum eligibility in light of changed conditions.

The Analysis contrasts recent decisions by the Seventh Circuit and other federal circuits with the holding in *Chen*,<sup>7</sup> and shows these decisions to be at odds with the international and domestic instruments governing asylum eligibility. In conclusion, the Analysis highlights the negative effects of the prevailing position on asylum eligibility based on past persecution, with regard to both aliens who have suffered persecution but were found ineligible for asylum in the United States and to the international stature of the United States.

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5. Throughout this Comment, as in the Protocol, the Refugee Act, and administrative and judicial opinions, labels such as "alien," "asylum-seeker," and "refugee" are used. It is important to keep in mind that behind these labels are men, women, and children who have lived through severe physical abuse and mistreatment in their home countries.

6. Interim Dec. No. 3104 (BIA Apr. 25, 1989).

7. *Id.*

## I. BACKGROUND

A. *Asylum Process in the United States*

Asylum serves as a humanitarian response to persons who are, by definition, unable or unwilling to turn to their own governments for protection from persecution.<sup>8</sup> In the United States, statutory recognition of asylum first appeared in 1980 with the passage of the Refugee Act.<sup>9</sup> Today, the Refugee Act<sup>10</sup> and the federal regulations promulgated under it govern the asylum process in the United States. The Refugee Act is a part of the federal immigration statute, the Immigration and Nationality Act ("INA"),<sup>11</sup> and is administered by the Attorney General of the United States.<sup>12</sup>

Section 208 of the INA authorizes the Attorney General to establish an asylum application procedure for an asylum-seeking alien present in the United States.<sup>13</sup> The procedure promulgated by the Attorney General under the authority of Section 208 directs an asylum-seeking alien to file an asylum application with either an Asylum Office, District Director, or Immigration Judge, depending on the circumstances.<sup>14</sup>

When the alien submits the application for asylum to a District Director, either directly or through an Asylum Office, the District

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8. STEPHEN H. LEGOMSKY, IMMIGRATION LAW AND POLICY 819 (1992); see *infra* notes 46-61 and accompanying text (discussing the refugee definition).

9. See LEGOMSKY, *supra* note 8, at 840 ("In 1974 the Justice Department issued regulations providing asylum criteria and procedures . . . but not until 1980 did asylum receive statutory recognition.").

10. Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended in scattered sections of 8 U.S.C.).

11. Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in 8 U.S.C. §§ 1101-1525 (1988 & Supp. II 1990)).

12. For practical purposes, the Attorney General delegates the administration of the INA to the Immigration and Naturalization Service ("INS") pursuant to federal regulations. THOMAS A. ALEINIKOFF & DAVID A. MARTIN, IMMIGRATION PROCESS AND POLICY 101-02 (2d interim ed., 1991). The INS is a federal governmental agency established within the Department of Justice. 13 U.S.C. § 1551 (1988). The INS divides the United States into four geographical regions: eastern, western, northern, and southern. An INS Regional Commissioner is responsible for each of the four regions, and each region is divided into various districts and is managed by a District Director. BILL O. HING, HANDLING IMMIGRATION CASES 16 (1985) (citing 8 C.F.R. § 100.4 (1973)).

13. 8 U.S.C. § 1158(a) (1988).

14. 8 C.F.R. § 208.4 (1990). These regulations prescribe the appropriate recipient of the asylum, depending on the procedural position of the alien at the time of application. For example, a different application procedure is prescribed for an alien making an affirmative application than for an alien who applies during exclusion or deportation proceedings. *Id.*

Director will review the asylum application for merit.<sup>15</sup> As part of the merit review, the District Director is required to request an advisory opinion from the Bureau of Human Rights and Humanitarian Affairs of the State Department ("BHRHA").<sup>16</sup> At its own option, the BHRHA may comment on the current conditions in the alien's country of origin, provide an assessment of the alien's likely treatment were he to return to his country of origin, and, in general, provide whatever information it deems helpful in deciding whether to grant asylum in a particular case.<sup>17</sup> If the District Director finds that the alien is eligible for a grant of asylum,<sup>18</sup> he then may, at his discretion, grant or deny asylum to the alien.<sup>19</sup> The District Direc-

15. Richard K. Preston, *Asylum Adjudications: Do State Department Advisory Opinions Violate Refugees' Rights and U.S. International Obligations?*, 45 MD. L. REV. 91, 108 (1986) (citing I.N.S. Operations Instruction § 208.9(d) (1980), reprinted in 4 IMMIGRATION LAW AND PROCEDURE, § 23-156.17 (C. Gordon & H. Rosenfield eds., 1984)).

16. Preston, *supra* note 15, at 108. At the BHRHA, the process is as follows:

Each application is reviewed individually by an officer in the Office of Asylum Affairs of [the BHR]HA and then is sent to the appropriate country desk officer in the Department. If appropriate, [the BHR]HA may request an opinion from the Office of the Legal Adviser or information from the U.S. Embassy in the applicant's country of nationality, or, if appropriate, in a third country. After agreement is reached between the asylum officer in [the BHR]HA and the desk officer on the proposed recommendation to INS, the draft advisory opinion and application file are reviewed by the Director of the Office of Asylum Affairs in [the BHR]HA, and in some cases by the geographic officer in [the BHR]HA or by the Deputy Assistant Secretary for Asylum and Humanitarian Affairs. It is rare for individual cases to rise to more senior levels. The proposed recommendation is then signed by the Director of the Office of Asylum Affairs and sent to INS.

*Id.* at 109 (alterations in original) (citing *Refugee Assistance: Hearings on H.R. 3195 Before the Subcomm. on Immigration, Refugees and Int'l. Law of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 55-56 (1983) (prepared statement of Elliott Abrams, Assistant Secretary, Bureau of Human Rights and Humanitarian Affairs, Department of State)).

17. 8 C.F.R. § 208.11 (1990).

18. See *infra* notes 43-45 and accompanying text (discussing asylum eligibility grounds).

19. 8 C.F.R. § 208.14(a) (1990); see also *infra* notes 70-78 and accompanying text (discussing in detail the discretionary nature of asylum); *In re Pula*, Interim Dec. No. 3033 (BIA Sept. 22, 1987) (listing the factors to be considered in the exercise of discretion with respect to a grant of asylum). In *Pula*, the BIA stated:

[T]he totality of circumstances and actions of an alien in his flight from the country where he fears persecution should be examined. . . . Among those factors which should be considered are whether the alien passed through any other countries or arrived in the United States directly from his country, whether orderly refugee procedures were in fact available to help him in any country he passed through, and whether he made any attempts to seek asylum before coming to the United States. In addition, the length of time the alien remained in a third country, and his living conditions, safety, and potential for long-term residency there are also relevant. . . . Further, whether the alien has relatives legally in the United States or other personal ties to this country which motivated him to seek asylum here rather than elsewhere is another factor to consider. . . . Moreover, if the alien engaged in fraud to circumvent

tor's decision to grant or deny asylum is not subject to appeal, other than in connection with any subsequent exclusion or deportation proceedings against the alien.<sup>20</sup>

When an alien first applies for asylum during exclusion or deportation proceedings, he submits the asylum application to the office of the Immigration Judge who has jurisdiction over his case.<sup>21</sup> Upon receipt of the asylum application, the Immigration Judge is required to seek a BHRHA advisory opinion pursuant to Section 208.11 of Chapter 8 of the Code of Federal Regulations.<sup>22</sup> Either the alien or the Immigration and Naturalization Service ("INS"), on behalf of the government, may appeal the Immigration Judge's decision as to asylum to the Board of Immigration Appeals ("BIA").<sup>23</sup>

The BIA is a part of the Executive Office for Immigration Review ("EOIR"),<sup>24</sup> which is an administrative body contained within the Department of Justice.<sup>25</sup> The EOIR has two divisions: trial and appellate.<sup>26</sup> The immigration courts administered by the Immigration Judges are the EOIR's trial courts, while the BIA is its appellate branch.<sup>27</sup> The BIA, like the immigration courts, is not a court established by Article I or Article III of the United States Constitution,<sup>28</sup>

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orderly refugee procedures, the seriousness of the fraud should be considered. . . .

[G]eneral humanitarian considerations, such as an alien's tender age or poor health, may also be relevant in a discretionary determination.

*Id.* at 17. The BIA further noted that "the alien should present evidence on any relevant factors which he believes support the favorable exercise of discretion in his case. *In the absence of any adverse factors, however, asylum should be granted in the exercise of discretion.*" *Id.* at 18 (emphasis added); see also DEBORAH E. ANKER, *THE LAW OF ASYLUM IN THE UNITED STATES* 165-71 (2d ed. 1991) [hereinafter ANKER, *THE LAW OF ASYLUM*] (offering a thorough treatment of asylum as a discretionary grant and commenting on the factors stated in *Pula*).

20. 8 C.F.R. § 208.18(b) (1990). Exclusion and deportation proceedings are administrative proceedings that the INS may bring against aliens to prevent them from entering the United States in the case of exclusion, or, in the case of deportation, to remove them from the United States. See HING, *supra* note 12, §§ 7.1-9.33 (discussing exclusion and deportation proceedings).

21. 8 C.F.R. § 208.4(c) (1990).

22. *Id.* § 242.17(c)(3); see also *supra* notes 16-17 and accompanying text (discussing the BHRHA's role in asylum claims).

23. *Id.* § 242.21(a).

24. HING, *supra* note 12, at 17. BIA precedential decisions are of binding authority for Immigration Judges except in jurisdictions where a federal court has ruled on an issue differently from the BIA. In such cases, the Immigration Judges are bound by the federal court's ruling. ANKER, *THE LAW OF ASYLUM*, *supra* note 19, at 14. The BIA does not review challenges as to the validity of regulations or the constitutionality of statutes. *Id.* at 15.

25. 8 C.F.R. § 3.1(a)(1) (1991) (discussing organization of the Office within the Department of Justice).

26. HING, *supra* note 12, at 17.

27. *Id.*

28. *Id.*

but rather is a quasi-judicial body established by federal regulation.<sup>29</sup> If the BIA affirms the decision to deny asylum and affirms or enters a final order of deportation against an alien, the alien may appeal to a federal court by petitioning for review.<sup>30</sup> The review at the federal court level, however, requires the support of reasonable, substantial, and probative evidence, and is based solely on the administrative record upon which the BIA entered the deportation order.<sup>31</sup> The court is limited to a review of alleged errors of law, procedure, or the record to determine whether the BIA decision was arbitrary or capricious.<sup>32</sup>

If an alien succeeds in obtaining asylum, he may remain in the United States for one year.<sup>33</sup> At the end of the one-year period, the INS examines the alien for admission to the United States as an immigrant.<sup>34</sup> Unless the alien's status as a refugee has been terminated within the one-year period due, for example, to changes in the alien's country of origin,<sup>35</sup> the alien is eligible for an adjustment of status from refugee to lawful permanent resident.<sup>36</sup> As a lawful per-

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29. 8 C.F.R. § 3.1 (1991) (establishing organization of BIA).

30. 8 U.S.C. § 1105a(a), (b) (1988 & Supp. II 1990). The petition for review must be filed within ninety days of the date of the BIA's final order of deportation unless the petitioner has been convicted of an aggravated felony, in which case the petition for review must be filed within thirty days of the final order. *Id.* § 1105a(a)(1) (Supp. II 1990); see also Preston, *supra* note 15, at 111 (discussing asylum adjudication procedure); John F. Weber, *The Law of Asylum in the U.S., in SALVADORAN AND GUATEMALAN ASYLUM CASES: A PRACTITIONER'S GUIDE TO REPRESENTING CLIENTS IN DEPORTATION PROCEEDINGS* (1985), reprinted in IMMIGRATION AND NATIONALITY LAW, 39TH SYMPOSIUM OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION 923 (Robert E. Juceam ed., 1985) (discussing the appeal process in asylum cases).

31. 8 U.S.C. § 1105a(a)(4) (1988); see also Preston, *supra* note 15, at 111 (discussing federal court review of immigration orders).

32. Preston, *supra* note 15, at 111.

33. Joni L. Andrioff, Comment, *Proving the Existence of Persecution in Asylum and Withholding Claims*, 62 CHI.-KENT L. REV. 107, 111 (1985).

34. 8 U.S.C. § 1159(a) (1988). Applications for adjustment of status are reviewed by a district director of the INS, regardless of whether the INS or an Immigration Judge granted the asylum. ANKER, *THE LAW OF ASYLUM*, *supra* note 19, at 65.

35. 8 U.S.C. § 1158(b) (1988). Other grounds for revocation of asylum are fraud in the alien's application for asylum or the occurrence of one of the specific circumstances listed in § 208.14(c)(1)-(3) of Title 8 of the Code of Federal Regulations. 8 C.F.R. § 208.24(a) (1990). The specific circumstances listed in § 208.14(c) are: (1) Where the alien was convicted of a "particularly serious crime in the United States, [and] constitutes a danger to the community;" (2) Where the alien had entered another nation prior to arriving in the United States and received an offer of some type of permanent resettlement from that nation; or (3) Where the alien is regarded as "a danger to the security of the United States." 8 C.F.R. § 208.14(c)(1)-(3) (1990).

36. 8 U.S.C. § 1159(a)(2) (1988). In order to effectuate the adjustment of status to lawful permanent resident, an alien must apply for the adjustment and meet specific requirements. 8 C.F.R. § 209.2(a) (1991). The regulation requires that an alien must be physically present in the United States for at least one year after receiving asylum, continue to be a refugee within the

manent resident, an alien enjoys the privilege of remaining in the United States and qualifying for naturalization.<sup>37</sup>

If, however, an alien fails to secure asylum or if his asylum is revoked for any reason,<sup>38</sup> the INS may bring exclusion or deportation proceedings against him.<sup>39</sup> Once the exclusion or deportation proceedings against an alien have begun, he may reassert his asylum claim,<sup>40</sup> satisfy the standards for withholding of deportation,<sup>41</sup> or face a return to his country of origin.<sup>42</sup> The following section explores circumstances under which an alien is eligible for asylum.

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meaning of the Refugee Act, be admissible as an immigrant at the time of the application for adjustment, and not be firmly resettled in another country. *Id.*; see also ANKER, *THE LAW OF ASYLUM*, *supra* note 19, at 64 (discussing the regulatory requirements for adjustment of status).

37. Weber, *supra* note 30, at 924. Only a person lawfully admitted for permanent residence in the United States qualifies for naturalization. 8 U.S.C. § 1429 (1988).

38. Asylum may be revoked if the INS establishes any of the following:

- (1) The alien no longer has a well-founded fear of persecution upon return due to a change of conditions in the alien's country of nationality or habitual residence; (2) There is a showing of fraud in the alien's application such that he was not eligible for asylum at the time it was granted; or (3) The alien has committed any act that would have been grounds for denial of asylum under ["mandatory denials" listed in 8 C.F.R. 208.14(c)(1)-(3) (1990)].

8 C.F.R. § 208.24(a) (1990); see also ANKER, *THE LAW OF ASYLUM*, *supra* note 19, at 65-68 (discussing revocation of asylum in detail).

Grounds for mandatory denial of asylum are invoked if an alien, "having been convicted by a final judgment of a particularly serious crime in the United States, constitutes a danger to the community," is a danger to the security of the United States, or has been firmly resettled within the meaning of the regulations. 8 C.F.R. § 208.14(c) (1990).

39. 8 C.F.R. § 208.22(b) (1990).

40. *Id.* § 208.24(e) (1990).

41. 8 U.S.C. § 1253(h) (1988). Note that for asylum eligibility, § 208(a) of the Refugee Act requires only a showing that the alien qualifies as a refugee under the Act, but for the withholding of deportation, § 243(h) of the Refugee Act requires a determination that the "alien's life or freedom would be threatened in . . . [his country of origin] on account of race, religion, nationality, membership in a particular social group, or political opinion." Pub. L. No. 96-212, 94 Stat. 105, 107 (1980) (codified as amended in 8 U.S.C. §§ 1158, 1253(h)(1) (1988)). In general, the satisfaction of the standard for the withholding of deportation under § 243(h) of the Refugee Act is considered more difficult than the showing of eligibility for asylum under § 208(a) of the Refugee Act. See *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1986) (surveying the different standards at issue in a deportation action and an asylum action); IRA J. KURZBAN, *IMMIGRATION LAW SOURCEBOOK* 216 (3d ed. 1992) (noting that courts require "more objective and corroborative evidence" in a § 243(h) withholding of deportation action than in a § 208(a) asylum action); Andrioff, *supra* note 33, at 113-15 (discussing deportation and the comparison of standards of proof under §§ 208(a) and 243(h) of the Act — §§ 1158(a) and 1253(h) of the INA, respectively).

42. Weber, *supra* note 30, at 895; see generally Wendy L. Fink, Note, *Joseph Doherty and the INS: A Long Way to International Justice*, 41 DEPAUL L. REV. 927 (1992) (discussing the related but separate topic of non-refoulement, the right of a refugee not to be returned to a country where he or she may face persecution).



## B. Statutory Background

### 1. Eligibility for a Grant of Asylum

An alien is eligible for a discretionary grant of asylum if the Attorney General, or a person to whom the Attorney General has delegated such authority, determines that the alien is a refugee within the scope of the definition provided in the Refugee Act.<sup>43</sup> Consequently, two phenomena must occur in order for an alien to receive asylum in the United States: the alien must qualify as a refugee under the Refugee Act,<sup>44</sup> and the Attorney General must exercise his discretion.<sup>45</sup>

### 2. Definition of a Refugee

The definition of a refugee set forth in the Refugee Act derives from a United Nations convention regarding the status of refugees.<sup>46</sup> By a 1950 resolution, the General Assembly of the United Nations created the Office of the United Nations High Commissioner for Refugees ("High Commissioner").<sup>47</sup> The General Assembly mandated that the High Commissioner follow directives given by the General Assembly or the Economic and Social Council of the United Nations.<sup>48</sup> The Economic and Social Council then formed a Committee on Statelessness and Related Problems ("Committee"). The efforts of this Committee culminated in a draft of the United Nations' 1951 Convention Relating to the Status of Refugees ("Convention").<sup>49</sup> The United Nations subsequently adopted the Convention, and numerous countries, excluding the United States, have acceded to it.<sup>50</sup> The Convention defined a refugee as a person

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43. 8 U.S.C. § 1158(a) (1988).

44. The Refugee Act defines a refugee at 8 U.S.C. § 1101(a)(42)(A) (1988); *see also infra* notes 46-61 and accompanying text (discussing the definition of "refugee").

45. *See In re Pula*, Interim Dec. No. 3033 (BIA Sept. 22, 1987) (listing the factors to be considered in deciding whether a discretionary grant of asylum should be made).

46. United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259 [hereinafter Convention].

47. *See Resolutions Adopted on the Reports of the Third Committee*, G.A. Res. 428, U.N. GAOR 3d Comm., 5th Sess., 325th mtg. (1950), reprinted in 3 UNITED NATIONS RESOLUTIONS 120 (Dusan J. Djonovich ed., 1973) (creating the office of the High Commissioner for Refugees).

48. *Id.*; *see also* GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 6 (1983) (noting that the High Commissioner is required to follow policy directions of the General Assembly and of the Economic and Social Council).

49. Convention, *supra* note 46.

50. Each country listed below signed both the 1951 Convention and the 1967 Protocol unless otherwise noted: "C" means that the country signed only the 1951 Convention, while "P" means

who, "owing to [a] well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion," is unable or unwilling to return to his country of origin.<sup>51</sup> The Committee drafting the Convention explained that "well-founded fear" means that the person "has *either* been actually a victim of persecution *or* can show good reason why he fears persecution."<sup>52</sup>

Realizing that the Convention applied only to those persons who became refugees as a result of events occurring before July 1, 1951, and wishing to provide equal status to all refugees covered by the definition contained in the Convention, the United Nations adopted the Protocol Relating to the Status of Refugees in 1967 ("Protocol").<sup>53</sup> The Protocol expressly adopted the definition of a refugee contained in the Convention and eliminated the temporal provision which made the Convention applicable only to those individuals who became refugees essentially as a result of World War II.<sup>54</sup>

Upon the advice and consent of the United States Senate,<sup>55</sup> Presi-

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that the country signed only the 1967 Protocol. As of February 1992, the following countries were parties to the 1951 Convention and/or the 1967 Protocol: Algeria, Angola, Argentina, Australia, Austria, Belgium, Belize, Benin, Bolivia, Botswana, Brazil, Burkina Faso, Burundi, Cameroon, Canada (P), Cape Verde (P), Central African Republic, Chad, Chile, China, Colombia, Congo, Costa Rica, Cyprus, Czech and Slovak Federal Republic, Denmark, Djibouti, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Ethiopia, Fiji, Finland, France, Gabon, Gambia, Germany, Ghana, Greece, Guatemala, Guinea, Guinea-Bissau, Haiti, Hungary, Iceland, Iran, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Kenya, Lesotho, Liberia, Liechtenstein, Luxembourg, Madagascar (C), Malawi, Mali, Malta, Mauritania, Morocco, Mozambique (C), Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Romania, Rwanda, Samoa (C), Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Somalia, Spain, Sudan, Suriname, Swaziland (P), Sweden, Tanzania, Togo, Tunisia, Turkey, Uganda, United Kingdom, United States (P), Uruguay, Venezuela (P), Yemen, Yugoslavia, Zaire, Zambia, Zimbabwe. UNITED STATES COMMITTEE FOR REFUGEES, WORLD REFUGEE SURVEY 1992, AT 108.

51. Convention, *supra* note 46, at 6261.

52. *Report of the Ad Hoc Committee on Statelessness and Related Problems*, U. N. ESCOR, Ad Hoc Comm. on Statelessness and Related Problems, 4th Sess., 26th mtg., at 39, U.N. Docs. E/1618, E/AC.32/5 (1950) (emphasis added). With respect to the suggestion that a well-founded fear of being persecuted includes past persecution, "It bears emphasizing . . . that at the time the Convention came into effect, the majority of the refugees covered by the Convention were victims of past persecution in Europe, which persecution clearly had ceased with the defeat of the Axis powers." *In re Chen*, Interim Dec. No. 3104, at 19-20 (BIA Apr. 25, 1989) (Heilman, Board Member, concurring).

53. Protocol, *supra* note 2.

54. See Convention, *supra* note 46, at 6225 (stating that "[f]or the purpose of the present Protocol, the term 'refugee' shall . . . mean any person within the definition of article 1 of the Convention as if the words 'As a result of events occurring before 1 January 1951' and the words 'as a result of such events' in article 1A(2) were omitted.").

55. The United States Senate ratified the Protocol on October 4, 1968, with 59 senators voting

dent Lyndon Johnson approved the accession of the United States to the Protocol on October 15, 1968.<sup>56</sup> The Congressional Conference on the Refugee Act of 1980 adopted the present statutory definition of a refugee with the express understanding that the definition is based on the definition used by the United Nations in the Protocol.<sup>57</sup>

Consequently, the Refugee Act also defines a refugee as a person who is unable or unwilling to return to his country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . ."<sup>58</sup> The United States Supreme Court, in *I.N.S. v. Cardoza-Fonseca*,<sup>59</sup> recognized that in adopting the refugee definition, Congress sought to conform to the United Nations's accord on refugees as embodied in the Protocol.<sup>60</sup> The United States's statutory definition of a refugee is thus consistent with the definition adopted by the United Nations in the Convention and subsequently in the Protocol. Both definitions thus contemplate two distinct grounds upon which a person can be found to be a refugee: past persecution or a well-founded fear of persecution.<sup>61</sup>

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for, 0 voting against, and 41 senators not voting. 114 Cong. Rec. 29,607 (1968).

56. Protocol, *supra* note 2, at 6257.

57. JOINT STATEMENT OF THE COMMITTEE OF CONFERENCE, S. REP. NO. 590, 96th Cong., 2d Sess. 19 (1980); see also Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act*, 19 SAN DIEGO L. REV. 1, 60 (1981) (noting that the conference committee adopted the United Nations's definition of a refugee); Arthur C. Helton, *I.N.S. v. Cardoza-Fonseca: The Decision and Its Implications*, 16 N.Y.U. REV. L. & SOC. CHANGE 35, 44 (1987-88) ("Congress intended that the statutes dealing with refugees and asylum, such as the Refugee Act, be interpreted and applied consistent with the Protocol.").

58. 8 U.S.C. § 1101(a)(42)(A) (1988).

59. 480 U.S. 421 (1986) (considering standards of proof for the withholding of deportation under § 243(h) of the Refugee Act and for asylum under § 208(a) of the Refugee Act).

60. *Id.* at 437. The Court noted "Congress's intent that the new statutory definition of 'refugee' be interpreted in conformity with the Protocol's definition. The Conference Committee Report, for example, stated that the definition was accepted 'with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol.'" *Id.* (citing JOINT STATEMENT OF THE COMMITTEE OF CONFERENCE, S. REP. NO. 590, 96th Cong., 2d Sess. 20 (1980)).

61. The dual standard of asylum eligibility, based on the definition of a refugee due to past persecution or a well-founded fear of future persecution, has received judicial and administrative recognition. Both the courts and the BIA have recognized that past persecution is a distinct basis upon which a person can be found to be a refugee within the meaning of the statute and thus be eligible for a grant of asylum. For example, the United States Supreme Court in *Cardoza-Fonseca* noted that under the United Nations's accord on refugees, § 1158(a) of the INA, and § 208(a) of the Refugee Act, to be eligible for a grant of asylum an alien only has to show that he is a refugee. *Id.* at 441. The refugee definition contained in the Refugee Act allows one to come within its terms "because of persecution or a well founded fear of persecution" on account of one or more of the specified grounds. 8 U.S.C. § 1101(a)(42)(A) (1988). The Ninth Circuit Court of Appeals observed that "past persecution, without more, satisfies the requirement of

### 3. Definition of Persecution

Congress failed to define the term persecution in the Refugee Act.<sup>62</sup> Likewise, persecution is neither defined in the Convention nor in the Protocol.<sup>63</sup> In a United Nations handbook governing refugee status and eligibility requirements,<sup>64</sup> the High Commissioner noted that while there is no universal definition of persecution, "a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group *is always persecution*. Other serious violations of human rights for the same reasons would also constitute persecution."<sup>65</sup>

In *I.N.S. v. Cardoza-Fonseca*,<sup>66</sup> the United States Supreme Court stated that while the explanations provided in the *Handbook* do not have the force of law, the *Handbook* "provides significant guidance in construing the Protocol, to which Congress sought to conform."<sup>67</sup> The Supreme Court further observed that the *Handbook* "has been widely considered useful in giving content to the obligations that the Protocol establishes."<sup>68</sup> The words of the Supreme Court indicate that the explanations of the terms of the Protocol contained in the *Handbook* may be used in interpreting the terms and provisions of the Refugee Act. Pursuant to this directive, the term persecution, as used in the Refugee Act, includes a threat to life or freedom on account of one of the enumerated grounds.<sup>69</sup>

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§ 101(a)(42)(A) [the statutory definition of a refugee], even independent of establishing a well-founded fear of future persecution." *Desir v. Ilchert*, 840 F.2d 723, 729 (9th Cir. 1988); see also *infra* notes 89-118 and accompanying text (discussing *In re Chen* and administrative recognition of the independence of the past persecution standard from the well-founded fear standard).

62. Andrioff, *supra* note 33, at 135; Weber, *supra* note 30, at 956.

63. GOODWIN-GILL, *supra* note 48, at 38.

64. HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES (1979) [hereinafter *HANDBOOK*]. At the outset of the *Handbook*, the High Commissioner stated that the *Handbook* "is meant for the guidance of government officials concerned with the determination of refugee status in the various Contracting States [those states which ratified or acceded to either the Convention, the Protocol, or both]." *Id.* at 2.

65. *Id.* at 14 cl. 51 (emphasis added).

66. 480 U.S. 421 (1986).

67. *Id.* at 439 n.22.

68. *Id.*

69. The full description of "persecution" is given in the *Handbook*. *HANDBOOK*, *supra* note 64, at 14 cls. 51-53. One commentator offered the following description of persecution: "Persecution results where the measures in question harm those interests and the integrity and inherent dignity of the human being to a degree considered unacceptable under prevailing international standards or under higher standards prevailing in the state faced with determining a claim to asylum or refugee status." GOODWIN-GILL, *supra* note 48, at 43 (emphasis added); see also *supra* note 58 and accompanying text (listing the grounds on which an alien may be found to be a refugee).

#### 4. Discretionary Nature of Asylum

Even when an alien qualifies as a refugee under the Refugee Act upon either the past persecution or the well-founded fear of persecution ground,<sup>70</sup> the refugee cannot obtain asylum unless the Attorney General favorably exercises his discretion and grants the refugee asylum.<sup>71</sup> The discretionary nature of asylum stems from the generally recognized rule of international law that every sovereign nation has exclusive control over persons present in its territory.<sup>72</sup> One of the implications of this rule is that every sovereign nation has the right to grant or deny asylum to those located within its boundaries.<sup>73</sup> It is therefore recognized that the right of asylum is the right of a nation, rather than the right of an asylum-seeker.<sup>74</sup>

The Convention and the Protocol embody the concept of discretionary asylum.<sup>75</sup> Similarly, the Refugee Act, which intentionally mirrors many of the provisions of the Protocol, embodies the proposition that the right of asylum belongs to the nation, and hence

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70. This Comment considers only the topic of past persecution. The topic of the well-founded fear of persecution standard is beyond the scope of this Comment and is not examined here. Asylum eligibility based on a well-founded fear of persecution is treated extensively in numerous articles, books, and court opinions. See, e.g., *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1986) (differentiating between past persecution and well-founded fear of persecution and discussing the well-founded fear standard); *In re Mogharrabi*, Interim Dec. No. 3028, at 9 (BIA June 12, 1987) (stating that "an applicant for asylum has established a well founded fear if he shows that a reasonable person in his circumstances would fear persecution"); HING, *supra* note 12, § 6.4 (discussing the well-founded fear standard); Barbara Jackman, *Well-Founded Fear of Persecution and Other Standards of Decision-Making: A North American Perspective*, in *ASYLUM LAW & PRACTICE IN EUROPE AND NORTH AMERICA* (Geoffrey Coll & Jacqueline Bhabha eds., 1992) (discussing asylum eligibility and the well-founded fear standard).

71. See *In re Pula*, Interim Dec. No. 3033 (BIA Sept. 22, 1987) (listing the factors to be considered in deciding whether a discretionary grant of asylum should be made).

72. Felice Morgenstern, *The Right of Asylum*, 1949 BRIT. Y.B. INT'L. L. 327.

73. See Paul Weis, *Legal Aspects of the Convention of 25 July 1951 Relating to the Status of Refugees*, 1953 BRIT. Y.B. INT'L. L. 478, 481 (discussing the question of the right of asylum); see also GOODWIN-GILL, *supra* note 48, at 121 (discussing the granting of asylum as a right to be exercised by the government); 2 JOHN BASSETT MOORE, *A DIGEST OF INTERNATIONAL LAW* 757 (1906) (stating that the right to asylum is the right of a government to grant or withhold residence privileges); Gregg A. Beyer, *Affirmative Asylum Adjudication in the United States*, 6 GEO. IMMIGR. L.J. 253, 257 (1992) (noting that accepting refugees is a discretionary exercise of national sovereignty); Morgenstern, *supra* note 72, at 331 (discussing the right to asylum in relation to the state of origin).

74. See Morgenstern, *supra* note 72, at 327, 335 (arguing that each nation's right to grant asylum to those present within its boundaries derives from each nation's territorial sovereignty and positing that "[t]here can be no doubt that the individual has no general 'right' of asylum against the state").

75. See Deborah E. Anker, *Exercising Discretion in Asylum Cases*, IMMIGR. J., April-June 1983, at 11, 18 (stating that "in the specific context of the U.N. Protocol, it is not the individual who has a right to asylum, but rather the right is vested in the acceding states").

that the grant of asylum "is left within the discretion of the Attorney General."<sup>76</sup> While an alien has no right to asylum itself, he does have a right to petition for asylum in the United States.<sup>77</sup>

Unless an alien qualifies as a refugee under the Refugee Act, the Attorney General may not exercise his discretion and grant the alien asylum. Furthermore, even if an alien qualifies as a refugee, it is of no avail to him in his efforts to secure asylum unless the Attorney General also exercises discretion.<sup>78</sup> The Refugee Act thus presents the asylum-seeker with a double hurdle: he must first qualify as a refugee under the Refugee Act and then obtain the Attorney General's discretionary grant of asylum. Unless an asylum-seeker overcomes both of these hurdles, he cannot receive asylum in the United States. The next section considers how changed conditions in an alien's country of origin affect his asylum eligibility.

## II. THE EFFECT OF CHANGE IN AN ALIEN'S COUNTRY OF ORIGIN ON HIS ASYLUM ELIGIBILITY

Most aliens seeking asylum wait several years from the time of their original application before receiving a final determination of their asylum eligibility.<sup>79</sup> During this time, changes of regime or other changes in conditions in the alien's country of origin may occur. When change does indeed occur, the question arises whether, following the change, an alien remains eligible for refugee status and thus for asylum. The following two sections explore and compare the United Nations's and the United States's positions on the issue of asylum eligibility in light of changed conditions.

### A. *The United Nations's Position*

The Convention expressly does not apply to any person who, due to changed conditions, can no longer refuse to seek protection from persecution from his own government.<sup>80</sup> Because the Protocol

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76. *Id.* at 18.

77. *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982) (discussing the right of aliens to submit and substantiate their claims for asylum).

78. The exercise of discretion is reviewable under an abuse of discretion standard. Under this standard of review, broad discretion is generally afforded to the decision-maker. *KURZBAN*, *supra* note 41, at 228 (citing *Rojas v. I.N.S.*, 937 F.2d 186, 189-90 (5th Cir. 1991)). However, the failure to exercise discretion constitutes an abuse of discretion. *Id.* at 553 (citing *Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954)).

79. *See Beyer*, *supra* note 73, at 278.

80. Convention, *supra* note 46, at 6262. Article 1(C) provides:

adopted the substantive provisions of the Convention, the foregoing limitation on refugee status, flowing out of changes in the alien's country of origin, is binding on all the nations which ratified or acceded to the Protocol.<sup>81</sup> However, the Convention, and the Protocol by adoption, except from the scope of the limiting provision any person "who is able to invoke compelling reasons arising out of previous persecution . . . ."<sup>82</sup> The High Commissioner concluded that this exemption applied to a situation in which, despite "fundamental changes" in an alien's country of origin, an alien will not lose his refugee status because he "may have been subjected to very serious persecution in the past . . . ."<sup>83</sup> The High Commissioner noted that the exemption reflects a general humanitarian principle that those who suffered serious persecution in the past should not be expected to repatriate.<sup>84</sup> The High Commissioner explained the reasoning behind the exemption by stating that "[e]ven though there may have been a change of regime in his country, this may not always produce a complete change in the attitude of the population, nor, in view of his past experiences, in the mind of the refugee."<sup>85</sup>

The United Nations's position on the effect of change in an alien's country of origin on his asylum eligibility can thus be summarized as follows: whether an alien should be ineligible for refugee status because of a change of conditions in his country of origin depends upon the severity of the persecution he suffered.

### *B. The Position Expressed by the Refugee Act and by Federal Regulations*

Similar to the Convention, the Refugee Act allows for the termination of an alien's status as a refugee if the Attorney General de-

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This Convention shall cease to apply to any person falling under the terms of section A [the refugee definition] if . . . (5) He can no longer, because the circumstances in connexion [sic] with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality . . . .

*Id.*

81. Protocol, *supra* note 2, at 6225; see also HANDBOOK, *supra* note 62, at 4 cl. 9 (stating that "[b]y accession to the 1967 Protocol, States undertake to apply the substantive provisions of the 1951 Convention to refugees as defined in the Convention, but without the 1951 dateline").

82. Convention, *supra* note 46, at 6263.

83. HANDBOOK, *supra* note 64, at 31 cl. 136.

84. *Id.* At least one commentator agrees that "[t]he object of the exception to the effects of a change of circumstances is clearly the continuation of protection for those who have suffered most seriously in their country of origin." GOODWIN-GILL, *supra* note 48, at 52.

85. HANDBOOK, *supra* note 64, at 31 cl. 136.

termines that the alien no longer qualifies as a refugee under the Refugee Act due to a change of conditions in his country of origin.<sup>86</sup> Under the regulations, the alien's asylum can be revoked if the INS establishes that "[t]he alien no longer has a well-founded fear of persecution upon return [to his country of origin] due to a change of conditions in the alien's country of nationality or habitual residence

. . . ."<sup>87</sup>

If an alien has not yet secured asylum, and conditions in his country of origin have changed to such an extent that he can no longer demonstrate a well-founded fear of persecution were he to return, the first of the two grounds of asylum eligibility established by the Refugee Act — the well-founded fear of persecution — would be unavailable to him. As a result, the alien's asylum eligibility would rest on a claim based solely on the second eligibility ground, that of past persecution. The federal regulations promulgated under the Refugee Act provide that an alien's application for asylum "shall be denied if the applicant establishes past persecution . . . but is determined not also to have a well-founded fear of future persecution . . . *unless* . . . the applicant has demonstrated compelling reasons for being unwilling to return to his country of [origin] . . . arising out of *the severity of the past persecution*."<sup>88</sup>

The United States's position on asylum eligibility in light of changed conditions in the alien's country of origin, as expressed by the Refugee Act and by the regulations, is identical to the United Nations's position as expressed by the High Commissioner. Both the Refugee Act, with its accompanying regulations, and the Convention contemplate an alien's continued asylum eligibility despite a change of conditions in his country of origin. Both positions base this continued eligibility for asylum on the existence of compelling reasons arising from the severity of the past persecution suffered by the alien. This is the same approach the BIA used in *In re Chen*.<sup>89</sup>

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86. 8 U.S.C. § 1158(b) (1992). The statute specifically provides that discretionary asylum "may be terminated if the Attorney General, pursuant to such regulations as the Attorney General may prescribe, determines that the alien is no longer a refugee within the meaning of section 1101(a)(42)(A) of this title owing to a change in circumstances in the alien's country of nationality . . . ." *Id.*

87. 8 C.F.R. § 208.24(a)(1) (1990).

88. *Id.* § 208.13(b)(1)(ii) (emphasis added).

89. Interim Dec. No. 3104 (BIA Apr. 25, 1989); see also *supra* notes 23-30 and accompanying text (noting the structure and role of the BIA).



C. *The Board of Immigration Appeals' Position in In re Chen*

The BIA, in *In re Chen*,<sup>90</sup> recognized and applied the principle of continued asylum eligibility in light of changed conditions in an alien's country of origin.<sup>91</sup> *Chen* is the only BIA decision which, in a climate of changed conditions in the alien's country of origin, resulted in a grant of asylum based solely on the allegation of severe past persecution.

Chen was a Chinese citizen who was admitted into the United States as a non-immigrant student.<sup>92</sup> He remained in the United States beyond the expiration date of his visa.<sup>93</sup> Subsequently, the INS brought a deportation action against Chen, and an Immigration Judge issued an order to show cause why he should not be deported.<sup>94</sup> At the deportation hearing, Chen applied for asylum and the withholding of deportation.<sup>95</sup>

Chen's application for asylum and his testimony at the deportation hearing indicated that his father, a Christian minister in China, had been a target of the Red Guards during the Cultural Revolution.<sup>96</sup> Chen's father was forbidden to continue his ministry, his income was terminated, his house was ransacked by the Red Guards, and he was imprisoned.<sup>97</sup> Later, Chen's father was "dragged through the streets in a humiliating fashion over 50 times and was daily required to write confessions of his [so-called] crimes."<sup>98</sup> On one occasion, described as a "Bible burning crusade," Chen's father was badly burned after being pushed into a "bonfire of Bibles."<sup>99</sup> The Red Guards continued their harsh treatment of Chen's father until his death at the age of forty-six.<sup>100</sup>

Chen's application for asylum and his related testimony revealed

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90. Interim Dec. No. 3104 (BIA Apr. 25, 1989).

91. *Id.* at 7. Note that *Chen* is an administrative decision of the BIA. While BIA decisions are not precedential for federal courts, the United States Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* said, "We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . ." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

92. *Chen*, Interim Dec. No. 3104, at 3.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 9.

97. *Id.*

98. *Id.*

99. *Id.* at 10.

100. *Id.*

that after his father's home was ransacked, Chen was locked in a room with his grandmother for over six months.<sup>101</sup> During the six months of his house arrest, Chen was not allowed to continue his education.<sup>102</sup> He was also interrogated, deprived of food, kicked, and bitten by the Red Guards.<sup>103</sup> When he returned to school, he was "abused and humiliated," and on one occasion, when he fell asleep at school, "[r]ocks were thrown at him,"<sup>104</sup> causing him injuries requiring "a month of intensive treatment."<sup>105</sup> In the following years, he was sent to rural villages for "reeducation."<sup>106</sup> Chen further alleged that he was treated harshly, was denied medical attention on two occasions, and was locked in a closet for five hours when he failed to write an "extensive criticism of his father demanded by one of his teachers."<sup>107</sup> Chen stated that he lived in "complete social isolation," and that as the son of a Christian minister, he could 'never outlive [his] status as a pariah, an outcast, an 'unrepentent' [sic] element.'"<sup>108</sup> Finally, Chen testified that he would rather commit suicide than return to China.<sup>109</sup>

The Immigration Judge concluded that because of the changed conditions in China, specifically the "'leniency of the present Government of China to mere religious activity,'" Chen could not have a well-founded fear of persecution in the future.<sup>110</sup> Upon reaching this conclusion, the Immigration Judge denied Chen's application for asylum and found him deportable.<sup>111</sup>

Chen appealed and the BIA granted his application for asylum.<sup>112</sup> The INS then moved the BIA to reconsider and clarify its decision.<sup>113</sup> The BIA granted this motion, reconsidered its decision, and left its prior decision to grant Chen asylum undisturbed.<sup>114</sup>

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101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 11.

108. *Id.* (alterations in original).

109. *Id.*

110. *Id.* The Immigration Judge's decision was bolstered by a BHRHA advisory opinion which stated that Chen did not have a well-founded fear of persecution. *Id.* at 16-17 (Heilman, Board Member, concurring).

111. *Id.* at 2.

112. *Id.*

113. *Id.*

114. *Id.*

In deciding to grant Chen asylum, the BIA recognized that the Refugee Act provides two independent grounds for establishing asylum eligibility: past persecution and a well-founded fear of persecution.<sup>115</sup> The BIA stated that "there may be cases where the favorable exercise of discretion is warranted for humanitarian reasons even if there is little likelihood of future persecution."<sup>116</sup> In support of this statement, the BIA cited the general humanitarian principle set forth in the *Handbook*, which states that those who have suffered serious persecution in the past should not be expected to repatriate despite changed conditions in their country of origin.<sup>117</sup>

In reaching its decision to grant Chen asylum in the absence of a well-founded fear of persecution, the BIA took into account the fact that he suffered serious persecution on the basis of religion, one of the asylum eligibility grounds specifically codified in the Refugee Act, and the fact that he feared repatriation.<sup>118</sup> In *Chen*, the BIA thus applied the position of the United Nations and the Refugee Act that an alien who has based his refugee status on past persecution does not lose that status due to changed conditions in his country of origin if he can show that he was subjected to serious past persecution, one of the recognized grounds for refugee status.

#### *D. Current Administrative and Judicial Positions on the Past Persecution Standard*

##### *1. Board of Immigration Appeals*

*Chen*, however well-reasoned and grounded in the Refugee Act and the Convention, is unique among BIA and court decisions in its emphasis on past persecution as a determinative factor in evaluating asylum eligibility.<sup>119</sup> In *In re D— L— & A— M—*,<sup>120</sup> the BIA utilized the more common approach to evaluating whether to grant asylum and focused on a well-founded fear of persecution. The *D— L— & A— M—* decision is significant in the context of this

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115. *Id.* at 4-5. The BIA noted that "[t]here has, heretofore, been less emphasis in the courts and within this Board on situations where past persecution is the main, or only, basis for an asylum applicant's claim. However, it is clear from the plain language of the statute that past persecution can be the basis for a persecution claim . . . ." *Id.* at 5.

116. *Id.* at 7.

117. *Id.* at 8 (citing *HANDBOOK*, *supra* note 64, at 31 cl. 136).

118. *Id.* at 12-13.

119. See *supra* note 115 (noting that in the past, courts placed little emphasis on situations where persecution was the main basis for asylum application).

120. Interim Dec. No. 3162 (BIA Oct. 16, 1991).

Comment because it shows an unwillingness to grant asylum on the basis of past persecution, even in a situation where the conditions in the alien's country of origin did not change.

In *D— L— & A— M—*, the BIA affirmed the Immigration Judge's decision to deny asylum to a husband and wife, both of whom were Cuban citizens.<sup>121</sup> In 1989, the couple used falsified Spanish passports to board a U.S.-bound commercial flight in Spain.<sup>122</sup> Immediately upon their arrival in the United States, they surrendered their passports to INS officials, identified themselves as Cuban citizens, and requested asylum.<sup>123</sup> The husband's history of confrontations with the Castro government prior to his departure from Cuba in 1983 substantiated his claim to asylum.<sup>124</sup> Specifically, the alien alleged that he was a member of an organization which intended to overthrow the Castro government.<sup>125</sup>

In 1963, the Cuban police arrested the husband for his activities in the anti-Castro organization.<sup>126</sup> Following his arrest, he was detained for three months without a trial, and while in jail was tortured and raped.<sup>127</sup> Upon his release from jail, he was forbidden from resuming work at his former job.<sup>128</sup> The alien further alleged that his father was also arrested in 1963 and was sentenced to prison for five years for participating in the anti-Castro organization.<sup>129</sup> Like the alien, his father was abused in prison; he died seven months after his release.<sup>130</sup> The alien was arrested and questioned by the Cuban police on other occasions, most recently in 1980.<sup>131</sup> During the last detention he was held for twenty-four hours and threatened to be tried for the same crimes as his father.<sup>132</sup>

The Immigration Judge denied the aliens' applications for asylum on statutory grounds and held that they did not merit asylum as a matter of discretion.<sup>133</sup> The aliens appealed on the grounds that the

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121. *Id.* at 1.

122. *Id.* at 2.

123. *Id.*

124. *Id.* The wife based her asylum application on that of her husband. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

Immigration Judge did not properly consider the male applicant's testimony of past persecution.<sup>134</sup> In affirming the Immigration Judge's decision, the BIA relied primarily on the well-founded fear standard.<sup>135</sup> With respect to past persecution, the BIA only considered the alien's most recent arrest and concluded that it did not constitute persecution.<sup>136</sup> The BIA then stated that "asylum may be denied as a matter of discretion if there is little likelihood of present persecution."<sup>137</sup> The BIA decided that the 1963 arrest and the restriction on employment did not establish the alien's "well-founded fear of detention or harm upon returning to Cuba on account of his political opinion or other statutory grounds."<sup>138</sup> Because the BIA found "little likelihood" of future persecution, it decided not to reach the issue of whether the alien's 1963 arrest and mistreatment in jail constituted past persecution.<sup>139</sup> Consequently, the BIA exercised its discretion and denied asylum to the aliens.<sup>140</sup>

## 2. *Courts of Appeals Decisions for Circuits Other Than Seventh*

Subsequent to the BIA's decision in *Chen*,<sup>141</sup> various circuits have acknowledged that an alien may qualify for asylum on the basis of past persecution, provided that repatriation would be inhumane.<sup>142</sup> In none of the cases under review where changed conditions were involved, however, have the courts found the alleged past persecution sufficiently severe to warrant asylum.

Judge D.H. Ginsburg of the District of Columbia Circuit confronted an asylum case involving changed conditions in an alien's

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134. *Id.* at 3.

135. *Id.* at 5.

136. *Id.* (citing *Zalega v. I.N.S.*, 916 F.2d 1257, 1260-61 (7th Cir. 1990)); see also *infra* notes 174-93 (discussing the *Zalega* decision, which supports the proposition that an alien "has not shown that the circumstances of that brief detention and interrogation constituted persecution").

137. *D— L— & A— M—*, Interim Dec. No. 3162, at 5 (BIA Oct. 16, 1991) (citing *In re Chen*, Interim Dec. No. 3104 (BIA Apr. 25, 1989)); see also *supra* notes 90-118 and accompanying text (supporting this proposition).

138. *D— L— & A— M—*, Interim Dec. No. 3162, at 5 (BIA Oct. 16, 1991).

139. *Id.*

140. *Id.*

141. Interim Dec. No. 3104 (BIA Apr. 25, 1989); see also *supra* notes 90-118 and accompanying text (discussing the *Chen* case).

142. See, e.g., *Tokarska v. I.N.S.*, 978 F.2d 1, 2 (1st Cir. 1992) (acknowledging that where repatriation would be inhumane, asylum may be granted solely on the basis of past persecution); *Skalak v. I.N.S.*, 944 F.2d 364, 365 (7th Cir. 1991) (stating that a history of severe persecution may make repatriation inhumane).

country in *Gutierrez-Rogue v. I.N.S.*<sup>143</sup> This case involved a Nicaraguan woman who alleged that, among other things, she was "threatened with jail," visited weekly by Sandinista security officers, and threatened with death by a civilian group supporting the Sandinista Defense Committee.<sup>144</sup> The Sandinista government pursued Gutierrez-Rogue because her husband was an Air Force sergeant before the revolution who subsequently fled Nicaragua and joined the "Contras."<sup>145</sup> The government also pursued her because she refused to join the neighborhood Sandinista Defense Committee and failed to otherwise support the Sandinista regime.<sup>146</sup>

The BIA denied Gutierrez-Rogue's application for asylum, reasoning that she could not have a well-founded fear of persecution in light of the fall of the Sandinista regime.<sup>147</sup> The BIA acknowledged that the Sandinistas persecuted Gutierrez-Rogue, but denied her asylum as a matter of discretion.<sup>148</sup> Gutierrez-Rogue then appealed this decision.

Judge Ginsburg reviewed the BIA decision under an abuse of discretion standard. The judge compared her claim to that of the plaintiff in *In re Chen*<sup>149</sup> and said that what Gutierrez-Rogue suffered, "although no doubt very frightening, was not nearly [as] severe [as what Chen had suffered]."<sup>150</sup> Judge Ginsburg then concluded that the BIA did not abuse its discretion in denying asylum in this case.<sup>151</sup>

In *Tokarska v. I.N.S.*,<sup>152</sup> the First Circuit acknowledged that where repatriation would be inhumane, asylum may be granted based solely on past persecution, but it failed to find such a situation in the case under review. In this case, Tokarska, a Polish Solidarity

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143. 954 F.2d 769 (D.C. Cir. 1992).

144. *Id.* at 771. Sandinistas also coerced Gutierrez-Rogue to spend one year in Cuba studying Marxism and teaching in exchange for her husband's release from imprisonment. *Id.* When she refused to spend two more years in Cuba, the Sandinista government assigned her to teach at a school far from her home. *Id.* The government also took away her food rationing card. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 770.

148. *Id.* at 771.

149. See *supra* notes 90-118 and accompanying text (discussing the *Chen* decision).

150. *Gutierrez-Rogue*, 954 F.2d at 772.

151. *Id.* Similarly, the Fourth Circuit recently held that it was not an abuse of discretion for the BIA to deny asylum based on past persecution consisting of verbal and written threats to an alien and his family. *Chavez-Robles v. I.N.S.*, No. 91-2511, 1992 U.S. App. LEXIS 13618, at \*8 (4th Cir. June 10, 1992).

152. 978 F.2d 1 (1st Cir. 1992).

member, was struck and injured by a tear-gas canister during an anti-government demonstration, was arrested during another demonstration, and suffered physical injury at the hands of the police.<sup>153</sup>

In deciding to deny Tokarska asylum, the First Circuit cited a decision of the Seventh Circuit in which Judge Richard Posner stated, "The experience of persecution may so sear a person with distressing associations with his native country that it would be inhumane to force him to return there, even though he is in no danger of further persecution."<sup>154</sup> The First Circuit decided Tokarska's was "not such a case."<sup>155</sup>

The Fifth Circuit, in *Rivera-Cruz v. I.N.S.*,<sup>156</sup> found no error in a BIA decision concluding that in light of the changed conditions in Nicaragua<sup>157</sup> and despite past persecution, an alien did not merit asylum.<sup>158</sup> Rivera-Cruz's claim of past persecution was based on an incident during which he was beaten by Sandinista soldiers to a point where he suffered a broken leg and a broken finger, requiring twenty-five days of hospitalization.<sup>159</sup> The court stated that the facts "d[id] not indicate a level of persecution such that repatriation would be inhumane."<sup>160</sup>

In *Klawitter v. I.N.S.*,<sup>161</sup> the Sixth Circuit considered the alleged persecution of a Polish alien, which consisted of interrogations, threats by Polish secret police, and a rape by a colonel of the secret police.<sup>162</sup> The court decided that even if these allegations were true, they did not rise to the level of abuse suffered by the asylum-seeker in the *Chen* case.<sup>163</sup> The court reasoned that because gross persecution like that alleged in *Chen* was not alleged in this case, the "humanitarian considerations" present in *Chen* were lacking here.<sup>164</sup>

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153. *Id.* at 2. Tokarska was also jailed for twenty-four hours, her desk at work was searched, and she was discriminated against at her job. *Id.*

154. *Id.* (citing *Skalak v. I.N.S.*, 944 F.2d 364, 365 (7th Cir. 1991)); see also *infra* notes 226-27 and accompanying text (discussing Judge Posner's view of asylum claims based on past persecution).

155. *Tokarska*, 978 F.2d at 2.

156. 948 F.2d 962 (5th Cir. 1991).

157. In April 1990, the Sandinista regime was replaced by a popularly elected government led by Violeta Chamorro. *Id.* at 965.

158. *Id.* at 969.

159. *Id.* at 965.

160. *Id.* at 969.

161. 970 F.2d 149 (6th Cir. 1992).

162. *Id.* at 150.

163. *Id.* at 153; see also *supra* notes 90-118 (discussing the decision in *Chen*).

164. *Klawitter*, 970 F.2d at 153.

Thus, while courts acknowledge *Chen*, they do not view alleged persecution in other cases involving changed conditions as severe enough to warrant asylum. In this respect, the Seventh Circuit is no different.

### 3. Seventh Circuit Court of Appeals

Recent decisions of the Seventh Circuit reflect the BIA's stance in *D—L— & A—M—*<sup>165</sup> rather than its position in *In re Chen*.<sup>166</sup> Whether or not the particular conditions in an alien's country of origin have changed, the Seventh Circuit concentrates on the well-founded fear standard and summarily dismisses allegations of persecution that do not satisfy the past persecution standard.

In *Kubon v. I.N.S.*,<sup>167</sup> the Seventh Circuit affirmed a BIA decision denying a Polish asylum-seeker's request for asylum and the withholding of deportation.<sup>168</sup> Kubon asserted that he was a member of Solidarity, an anti-government organization.<sup>169</sup> As a part of his membership in Solidarity, Kubon attended meetings, distributed leaflets and anti-government literature, and participated in demonstrations.<sup>170</sup> He based his claim to asylum on both past persecution and a well-founded fear of persecution, substantiated by a five-day detention for transporting anti-government literature.<sup>171</sup>

Because the BIA took administrative notice that Solidarity had become a part of the coalition governing Poland, the Seventh Circuit affirmed the BIA's holding that Kubon's fear of persecution by the Polish government for his membership in Solidarity was not well-founded.<sup>172</sup> With respect to Kubon's claim of past persecution, the Seventh Circuit held that the five-day detention for political opposition did not amount to past persecution.<sup>173</sup>

A month later, the Seventh Circuit decided *Zalega v. I.N.S.*<sup>174</sup> In

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165. Interim Dec. No. 3162 (BIA Oct. 16, 1991).

166. Interim Dec. No. 3104 (BIA Apr. 25, 1989).

167. 913 F.2d 386 (7th Cir. 1990).

168: *Id.* at 388.

169. *Id.* at 387.

170. *Id.* at 388.

171. *Id.*

172. *Id.*

173. *Id.* The court reasoned that the evidence of a five-day detention for transporting anti-government literature did not establish Kubon's claim of past persecution "since a brief confinement for political opposition to a totalitarian regime does not necessarily constitute persecution." *Id.* (citation omitted).

174. 916 F.2d 1257 (7th Cir. 1990). Although the Seventh Circuit decided *Zalega* after



this case, the court raised the level of evidence needed to warrant asylum eligibility on the grounds of past persecution.<sup>175</sup> Like Kubon, Zalega was a citizen of Poland.<sup>176</sup> Zalega, however, was not a member of the Solidarity organization.<sup>177</sup> His problems with the Communist government of Poland started at the end of 1981, when he refused to sign an oath of loyalty to Communist party officials.<sup>178</sup> Following his refusal to sign the oath, military police arrested and interrogated Zalega on three occasions.<sup>179</sup> Within a few months of his refusal to sign the oath, Zalega was dismissed from his job as a manager of a Polish government-owned farm.<sup>180</sup> Beginning that same year, and continuing until he left Poland two years later, the police regularly arrested Zalega, each time interrogating him for three to five hours about his association with a certain Solidarity member and about other aspects of his life.<sup>181</sup> Following his last arrest, Zalega was detained for thirty-six hours.<sup>182</sup> When Zalega returned home, he found that in his absence his apartment had been searched and that some of his personal property had been confiscated.<sup>183</sup>

Zalega entered the United States in 1984 as a visitor.<sup>184</sup> When he overstayed his visa, the INS obtained an Order to Show Cause why he should not be deported.<sup>185</sup> At that point, Zalega applied for asylum and the withholding of deportation on the basis of political persecution.<sup>186</sup> In addition to the foregoing facts, Zalega also alleged that the police had detained his parents and searched their home after his brother left Poland for the United States, and that after his own departure from Poland the police had questioned his parents.<sup>187</sup>

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*Kubon*, and subsequent to changes in the political regime in Poland which made future persecution based on Solidarity membership or anti-communist activities less likely, the Seventh Circuit in *Zalega* reviewed the BIA's decision as if no changes took place because the changes in Poland transpired after the BIA rendered its decision in the case. *Id.* at 1261 n.5.

175. *Id.* at 1260-61.

176. *Id.* at 1258.

177. *Id.* at 1258 n.2.

178. *Id.* at 1258.

179. *Id.*

180. *Id.*

181. *Id.* at 1258-59.

182. *Id.* at 1259.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

Finally, Zalega testified that if he returned to Poland, "the authorities would resume the questioning, would deny him suitable government employment and would not allow him to travel to capitalist countries."<sup>188</sup> The Immigration Judge denied Zalega's applications and the BIA affirmed, concluding that the harassment Zalega suffered did not amount to persecution.<sup>189</sup>

The Seventh Circuit reviewed the BIA's conclusion that Zalega's mistreatment at the hands of the Polish authorities was insufficient to show past persecution and affirmed the BIA's decision to deny asylum.<sup>190</sup> The Seventh Circuit found that the BIA's conclusion that Zalega did not suffer past persecution was supported by substantial evidence because "Zalega was never formally charged or convicted of any crime, was detained for relatively short periods of time and was not mistreated while incarcerated."<sup>191</sup> In support of its decision, the Seventh Circuit further noted that Zalega was able to leave Poland and visit the United States.<sup>192</sup> Addressing Zalega's fear of returning to Poland, the court reasoned that because it found that the harassment Zalega suffered did not constitute persecution, his fear that he would experience the same harassment upon return, however genuine it might have been, did not satisfy the well-founded fear of persecution standard.<sup>193</sup>

After *Kubon* and *Zalega*, the Seventh Circuit continued to focus on the well-founded fear of persecution standard and remained unmoved by allegations of past persecution. In the unpublished, consolidated case of *Szczech v. I.N.S.*,<sup>194</sup> the court had an opportunity to examine a range of conduct to determine whether any of it amounted to persecution, and, if it did, whether it was persecution grave enough to justify a grant of asylum even in the absence of a well-founded fear of future persecution.

The three aliens involved in these consolidated cases — *Szczech*, *Wilamowski*, and *Chrzascik* — were Polish citizens who, prior to leaving Poland, were active in the outlawed Solidarity organization.<sup>195</sup> The first of these cases involved *Szczech*, who was a promi-

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188. *Id.* at 1260-61.

189. *Id.* at 1261.

190. *Id.*

191. *Id.* at 1260.

192. *Id.*

193. *Id.* at 1261.

194. Nos. 90-2307, 91-2584, 91-2642, 1992 U.S. App. LEXIS 14077 (7th Cir. May 26, 1992).

195. *Id.* at \*1, 3-4.

nent local organizer of Solidarity.<sup>196</sup> Szczech had entered the United States illegally to escape the abuse he suffered under the Communist authorities for his membership in Solidarity.<sup>197</sup> While in Poland, Szczech was arrested eight to nine times, and each time he was detained for twenty-four to forty-eight hours.<sup>198</sup> During several of the detentions, he was questioned and beaten.<sup>199</sup> Szczech's house was often searched, and the authorities "approached his family in an intimidating manner."<sup>200</sup> Furthermore, the authorities arrested and questioned his brother about Szczech's Solidarity activities.<sup>201</sup>

Szczech applied for asylum when the INS commenced deportation proceedings against him.<sup>202</sup> The Immigration Judge decided that Szczech's Solidarity activities did "not reach the level which would result in the Polish government pinpointing him for persecution"<sup>203</sup> and denied his request for asylum. On appeal from the Immigration Judge's decision, the BIA took administrative notice of the changed conditions in Poland, notably that the leader of Solidarity, Lech Walesa, had been elected President of Poland.<sup>204</sup> Because the former leader of Solidarity had become the President of Poland, the BIA concluded that Szczech did not possess a well-founded fear of persecution.<sup>205</sup> The BIA also held that the abuse Szczech suffered in Poland did not constitute such past persecution as would allow a grant of asylum in the absence of a well-founded fear of persecution.<sup>206</sup>

Like Szczech, Wilamowski had fled Poland after being abused by Polish authorities for his association with Solidarity,<sup>207</sup> and he entered the United States as a visitor.<sup>208</sup> Before he left Poland, Wilamowski had met with Lech Walesa on two occasions, sabotaged a Soviet building, and distributed leaflets.<sup>209</sup> Wilamowski was arrested on seven occasions and kept in detention for forty-eight hours each

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196. *Id.* at \*1.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at \*2.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at \*3.

207. *Id.*

208. *Id.*

209. *Id.*

time.<sup>210</sup> He was interrogated and beaten while in detention,<sup>211</sup> and he was also threatened with imprisonment for a life term and with labor at a Siberian work-camp.<sup>212</sup>

As in Szczech's case, the Immigration Judge determined that the abuse Wilamowski suffered did not rise to the level of persecution.<sup>213</sup> Furthermore, the Immigration Judge decided that Wilamowski could not have possessed a well-founded fear of persecution since Solidarity controlled many areas of the government.<sup>214</sup> The BIA affirmed the Immigration Judge's decision to deny asylum and held that the treatment Wilamowski suffered at the hands of the Communist Polish authorities "was not severe enough to block repatriation . . . ." <sup>215</sup>

Much like Szczech and Wilamowski, Chrzascik too left Poland to escape harsh treatment by the Communist authorities due to his involvement in the Solidarity organization.<sup>216</sup> While in Poland, he had printed and distributed leaflets in support of Solidarity and stored Solidarity's flags and banners.<sup>217</sup> Polish militia and secret police had raided Chrzascik's home and arrested him.<sup>218</sup> During detention, he was interrogated and "beaten about the head and body with a lead pipe."<sup>219</sup> Before leaving Poland, he was arrested several more times and was detained, threatened, and beaten.<sup>220</sup> After he left Poland, his wife, who had remained in the country, was "questioned, harassed, and threatened."<sup>221</sup> The BIA held that Chrzascik did not have a well-founded fear of persecution and that the abuse he "received from Polish authorities was not so severe as to warrant asylum."<sup>222</sup>

Upon reviewing the BIA decisions in the Szczech, Wilamowski, and Chrzascik cases, the Seventh Circuit agreed with the BIA that because of the changed conditions in Poland, in each case the indi-

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210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at \*4.

214. *Id.*

215. *Id.*

216. *Id.* at \*4-5.

217. *Id.* at \*4.

218. *Id.* at \*5.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* at \*6.

vidual asylum-seeker's fear of persecution was not well-founded.<sup>223</sup> The Seventh Circuit reached this conclusion despite the three aliens' allegations that, regardless of the Solidarity party's position in the government, the police and military continued to be controlled by the same authorities who had inflicted the abuse and harassment before Solidarity's rise to power.<sup>224</sup>

The Seventh Circuit acknowledged that each of the aliens suffered physical harm as a result of their political opinions.<sup>225</sup> The court, however, recalled the opinion written by Judge Posner in *Skalak v. I.N.S.*,<sup>226</sup> in which the judge hypothesized that even past persecution as severe as that endured by survivors of Nazi concentration camps might not be sufficient to prevent a forced repatriation of those survivors to Germany if the persecuted group was governing there.<sup>227</sup> In the present cases, the Seventh Circuit held that "whatever the minimum level of past persecution may be to avoid repatriation,"<sup>228</sup> the past persecution suffered by the aliens in these cases did not reach that level. Consequently, the court affirmed the BIA's denials of asylum to Szczech, Wilamowski, and Chrzascik.<sup>229</sup>

The foregoing cases illustrate that whether or not a change of regime or conditions in a particular alien's country of origin has taken place, the Seventh Circuit follows the *D—L— & A—M—*<sup>230</sup> prospective focus on the well-founded fear standard rather than the *Chen*<sup>231</sup> retrospective consideration of allegations of persecution. The court examines whether an alien has a well-founded fear of persecution, and where it finds this is not the case, lists the al-

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223. *Id.* at \*7.

224. *Id.*

225. *Id.* at \*8.

226. 944 F.2d 364 (7th Cir. 1991).

227. *Szczech*, 1992 U.S. App. LEXIS 14077, at \*7 (citing *Skalak v. I.N.S.*, 944 F.2d 364, 365 (7th Cir. 1991)). In *Skalak*, Judge Posner specifically said:

The experience of persecution may so sear a person with distressing associations with his native country that it would be inhumane to force him to return there, even though he is in no danger of further persecution. Very few of the surviving German Jews returned to Germany after the destruction of the Nazi regime, and it would have been cruel to force them to do so on the ground that bygones are bygones. In such cases the attempted rebuttal fails; in lesser cases of past persecution and perhaps even in the most serious cases if the persecuted group has become the ruling group, deportation may not be inhumane.

*Skalak*, 944 F.2d at 365.

228. *Szczech*, 1992 U.S. App. LEXIS 14077, at \*8.

229. *Id.*

230. Interim Dec. No. 3162 (BIA Oct. 16, 1991).

231. Interim Dec. No. 3104 (BIA Apr. 25, 1989).

leged incidents of past persecution and dismisses them as insufficient for a grant of asylum. With respect to past persecution, the court has, in the discussed cases, reviewed a wide range of alleged harsh treatment of aliens by foreign governmental authorities. In each case, the court either concluded that the alleged governmental conduct did not rise to the level of persecution at all,<sup>232</sup> or that where there was persecution, in light of the changed conditions the persecution was not sufficient to warrant asylum.<sup>233</sup> The allegations of persecution which the Seventh Circuit has deemed insufficient for asylum eligibility in light of a changed political climate include arrests,<sup>234</sup> detentions,<sup>235</sup> threats of life imprisonment or forced labor in Siberia,<sup>236</sup> searches of homes,<sup>237</sup> and numerous beatings,<sup>238</sup> including blows to the head and body with a lead pipe.<sup>239</sup> The Analysis demonstrates that at least some of these incidents of persecution constitute compelling reasons for a grant of asylum despite changed political conditions.

### III. ANALYSIS

Under both the Protocol, to which the United States has acceded,<sup>240</sup> and the Refugee Act, past persecution and a well-founded

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232. See generally *Zalega v. I.N.S.*, 916 F.2d 1257 (7th Cir. 1990); *Kubon v. I.N.S.*, 913 F.2d 386 (7th Cir. 1990) (both holding that the aliens' alleged mistreatment, including detentions, interrogations, searches of their homes, and dismissals from government-controlled jobs, did not amount to persecution).

233. See *Szczzech*, 1992 U.S. App. LEXIS 14077, at \*8 (holding that in light of a change in government control, asylum should not be granted).

234. See, e.g., *Zalega*, 916 F.2d at 1258 (discussing alien's arrest for refusing to sign oath of loyalty to party officials); *Szczzech*, 1992 U.S. App. LEXIS 14077, at \*1, 3-4 (discussing the arrests of three aliens for their involvement in the Solidarity movement in Poland).

235. See, e.g., *Kubon*, 913 F.2d at 388 (discussing alien's five-day detention for transporting anti-government leaflets in Poland); *Zalega*, 916 F.2d at 1258-59 (describing alien's numerous detentions and interrogations by police); *Szczzech*, 1992 U.S. App. LEXIS 14077, at \*1-5 (discussing the detention of three different aliens for their involvement with the Solidarity movement in Poland).

236. See *Szczzech*, 1992 U.S. App. LEXIS 14077, at \*3 (discussing Wilamowski's experience with the Polish government authorities).

237. See, e.g., *Zalega*, 916 F.2d at 1259 (describing the search of alien's apartment by Polish authorities and confiscation of his personal property); *Szczzech*, 1992 U.S. App. LEXIS 14077, at \*4-5 (discussing the raid of Chrzascik's home and his subsequent arrest).

238. See generally *Szczzech*, 1992 U.S. App. LEXIS 14077, at \*1-5 (discussing three aliens' experiences of physical abuse inflicted by Polish government authorities).

239. See *Id.* at \*5 (describing Chrzascik's interrogation, arrest, and physical beating by Polish authorities).

240. See *supra* notes 55-56 and accompanying text (discussing President Johnson's approval of the Protocol in 1968).

fear of persecution exist as two distinct and independent grounds for establishing asylum eligibility.<sup>241</sup> Therefore, as has been judicially recognized,<sup>242</sup> an asylum-seeking alien will meet the requirement for refugee status if he has suffered persecution in the past, bases his application for asylum on that ground, and is able to present evidence supporting his claim of past persecution. An alien who meets the requirements for refugee status is eligible for the discretionary grant of asylum "even independent of establishing a well-founded fear of future persecution."<sup>243</sup>

Because the past persecution standard of asylum eligibility does not require the asylum-seeker to show a well-founded fear of persecution, it is useful to those asylum-seekers who either do not have a well-founded fear of future persecution or who cannot bear the evidentiary burden associated with that standard.<sup>244</sup> Indeed, the past persecution standard is the sole means of asylum eligibility for aliens from countries which have experienced significant changes of regime or conditions which protect the people in those countries from persecution.<sup>245</sup> This is because where such changes have occurred, it is unlikely that administrative entities or courts involved in asylum claims would find the requisite well-founded fear of future prosecution.

Both the Protocol and the Refugee Act, with its attendant regulations, state that where there has been a change of conditions in an alien's country of origin such that the conditions "with which he has been recognized as a refugee have ceased to exist,"<sup>246</sup> the alien is no

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241. See *supra* note 61 and accompanying text (noting the two grounds for asylum eligibility).

242. See *supra* note 59 and accompanying text (discussing the *Cardoza-Fonseca* decision in which the Supreme Court recognized the two grounds for asylum eligibility).

243. *Desir v. Ilchert*, 840 F.2d 723, 729 (9th Cir. 1988).

244. To qualify as a refugee under the well-founded fear of persecution standard, an alien must show a subjective fear of persecution and that a reasonable person in his place would fear persecution. *In re Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987).

245. Recently, for example, significant changes in conditions and regimes swept the countries of the former Soviet Block. The need for a viable past persecution standard will continue to exist as more political changes occur. For example, assume that the current conflict in what was formerly Yugoslavia will one day end. Further assume that Bosnia will be governed by a government representing Muslims, Croats, and Serbs. Also assume that the new government will be able to protect the entire population of Bosnia from persecution. A Bosnian Muslim then attempting to seek asylum in the United States would not be successful, unless the past persecution avenue for refugee status were opened to him. According to current caselaw, because of the change in conditions, the Bosnian could no longer reasonably fear persecution or refuse to avail himself of the protection of the Bosnian government.

246. Convention, *supra* note 46, at 6262.

longer eligible for asylum.<sup>247</sup> Thus, just as a change in conditions obliterates the possibility of asylum based on a well-founded fear, it destroys an asylum claim based on past persecution alone.

The only asylum claim which can survive changed conditions is one based on past persecution *plus something more*. The additional element of a viable asylum claim based on past persecution is a showing of "compelling reasons"<sup>248</sup> for not repatriating the asylum-seeker. These compelling reasons arise from the severity of past persecution,<sup>249</sup> and the justification for asylum eligibility based on the severity of past persecution lies in the humanitarian principle cited by the High Commissioner in the *Handbook*.<sup>250</sup> This principle states that asylum-seekers who suffered serious persecution in the past should not be expected to repatriate.<sup>251</sup>

Upon a review of the Protocol and the federal regulations promulgated under the Refugee Act, it is clear that with respect to asylum eligibility based upon a change of conditions in an alien's country of origin, the regulations are identical to the Protocol, as interpreted by the High Commissioner. While both authorities allow for the termination of an alien's eligibility for refugee status due to a change of conditions in the alien's country of origin, they also exempt from the termination provision those aliens who can show "compelling reasons"<sup>252</sup> based upon the severity of past persecution.<sup>253</sup> It is therefore both an international obligation of the United States under the Protocol, and a domestic obligation of the federal government under the Refugee Act, to deem as eligible for asylum those aliens who have suffered severe persecution in the past, even if the conditions in their countries have changed.

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247. See *supra* notes 80 and 86 and accompanying text (discussing situations in which an alien is no longer eligible for asylum).

248. See *supra* note 82 and accompanying text (noting the specific language of the exemption provided in the Convention); see also *supra* note 87 and accompanying text (citing the specific text of the exemption provided in the federal regulations).

249. See *supra* notes 82 and 87 and accompanying text (noting the specific text of the Convention and federal regulation).

250. HANDBOOK, *supra* note 64, at 31 cl. 136.

251. See *supra* notes 84-85 and accompanying text (setting forth the humanitarian principle relating to asylum cases).

252. See *supra* note 82 and accompanying text (noting the specific language of the exemption provided in the Convention); see also *supra* note 87 and accompanying text (noting the specific text of the exemption provided in the federal regulations).

253. See *supra* notes 82 and 87 and accompanying text (citing the specific text of the Convention and applicable federal regulations).



In *Chen*,<sup>254</sup> the alien could not establish a well-founded fear of persecution upon return to China because the Immigration Judge concluded that the Chinese government had become tolerant of religious activity.<sup>255</sup> The BIA agreed with the Immigration Judge that a reasonable person in Chen's circumstances would not have a well-founded fear of persecution on account of religion.<sup>256</sup> But in that case, the BIA honored the humanitarian principle and recognized that although the conditions had changed so that the alien could not show a well-founded fear of persecution, he nonetheless remained eligible for asylum because he had suffered severe persecution in the past.<sup>257</sup> The alien's house arrest and physical abuse constituted both past persecution and compelling reasons sufficient to trigger the humanitarian principle in the minds of the BIA judges.<sup>258</sup> In *Chen*, the BIA thus found the level of persecution sufficiently compelling to warrant a grant of asylum to an alien who had based his asylum claim on past persecution.

Unlike the BIA in *Chen*,<sup>259</sup> the Seventh Circuit, as demonstrated by the decisions in *Kubon*<sup>260</sup> and *Szczzech*,<sup>261</sup> has not yet been presented with a level of past persecution which, in its judgment, has been sufficiently compelling to warrant a grant of asylum to an alien who, because of changed conditions in his country of origin, does not have a well-founded fear of persecution. As Judge Posner's hypothetical example in *Skalak*<sup>262</sup> demonstrates, no alien today could make the showing the Seventh Circuit demands, for no group in the recent past has been persecuted to such a degree and in such numbers as were the Jews at the hands of the Nazis during World War II.<sup>263</sup> By raising to extreme heights the level of severity of the

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254. Interim Dec. No. 3104 (BIA Apr. 25, 1989).

255. See *supra* notes 110-11 and accompanying text (citing the Immigration Judge's decision in *Chen*).

256. *Chen*, Interim Dec. No. 3104, at 12.

257. The BIA stated that its "determination that the respondent ha[d] not established a well-founded fear of present or future persecution [wa]s not in itself determinative, since [it] ha[d] found that the respondent ha[d] clearly established that he and his family were severely persecuted in the past in China." *Id.*

258. *Id.* at 13.

259. *Id.*

260. 913 F.2d 386 (7th Cir. 1990).

261. Nos. 90-2307, 91-2584, 91-2642, 1992 U.S. App. LEXIS 14077 (7th Cir. May 26, 1992).

262. 944 F.2d 364 (7th Cir. 1991).

263. While the fate of Muslims in Bosnia today is appalling, it is quantitatively and qualitatively different from the treatment of Jews during World War II. Unlike the Jews during World War II, the Bosnian Muslims have an army and paramilitary groups allegedly inflicting upon

persecution necessary to demonstrate compelling reasons for a grant of asylum based on past persecution, the Seventh Circuit has made the past persecution standard insurmountable.

Unfortunately, other circuits that have considered asylum claims based on past persecution involving changed conditions have likewise set high standards for aliens trying to avoid repatriation because of treatment they had suffered at home. Many circuits<sup>264</sup> accept the proposition, offered by the BIA in *Chen*,<sup>265</sup> that "there may be cases where the favorable exercise of discretion is warranted for humanitarian reasons even if there is little likelihood of future persecution."<sup>266</sup> But no circuit has yet acted on this proposition where changed circumstances were involved.<sup>267</sup> Rather than use the avenue opened by the Convention and the Protocol,<sup>268</sup> by the Refugee Act and its regulations,<sup>269</sup> and explored by the BIA in *Chen*,<sup>270</sup> courts find the alleged persecution insufficient for a grant of asylum predicated on past persecution. Not since *Chen*<sup>271</sup> has a court deemed alleged past persecution sufficient to warrant a grant of asylum. As a result, the past persecution standard has lost any real meaning as a standard of asylum eligibility.

An ineffective past persecution standard not only hurts those aliens who escape from countries which have experienced changes in political conditions, but also those aliens, such as the aliens involved

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Serbs what the Serbs inflict upon them. Thus, the Bosnian Muslims are not only the persecuted, but also the persecutors. See HELSINKI WATCH, WAR CRIMES IN BOSNIA-HERCEGOVINA (1992) (containing detailed and substantiated accounts of war crimes committed by all parties to the conflict in the former Yugoslavia).

264. See *supra* notes 141-164 and accompanying text (discussing past persecution cases in the D.C., First, Fourth, and Sixth Circuits).

265. Interim Dec. No. 3104 (BIA Apr. 25, 1989); see also *supra* notes 90-118 and accompanying text (discussing the *Chen* decision).

266. *Chen*, Interim Dec. No. 3104, at 7.

267. Note that in a case preceding *Chen* that did not involve changed conditions, the Ninth Circuit in *Desir v. Ilchert* considered an asylum claim based on past persecution and held that the BIA erred when it concluded that the alien in that case did not establish his eligibility for asylum. 840 F.2d 723, 729 (9th Cir. 1988). *Desir*, a Haitian, sought asylum based on three arrests (one which lasted approximately two to three weeks), a beating with a wooden stick, and a warning that if caught again, he would be shot. *Id.* at 725. The Ninth Circuit concluded that what *Desir* suffered at the hands of the Haitian authorities constituted past persecution within the meaning of the Refugee Act. *Id.* at 726.

268. Convention, *supra* note 46; Protocol, *supra* note 2.

269. Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended in scattered sections of 8 U.S.C.).

270. Interim Dec. No. 3104 (BIA Apr. 25, 1989).

271. *Id.*

in *D— L— & A— M—*<sup>272</sup> and *Zalega*,<sup>273</sup> who are from countries where their persecutors are still in power. To obtain asylum eligibility, these aliens must satisfy a higher evidentiary burden, that of showing a well-founded fear of persecution.

By judicially rendering one of the two standards for asylum eligibility ineffective, the Seventh Circuit, as well as other federal circuits, offers the prospect of asylum only to those aliens who can show a well-founded fear of persecution. This result is contrary to that contemplated by the Protocol, the Refugee Act, and the regulations promulgated thereunder. These instruments contemplate and create two *distinct* grounds for asylum eligibility.<sup>274</sup> Moreover, these instruments make available the safe haven of asylum to aliens who have suffered severe persecution in the past, even if there is no danger of persecution were they to return home.<sup>275</sup>

Where political changes are such that they bring an end to the formal reign of those at the hands of whom an alien suffered persecution, but leave them a powerful source of influence in the alien's country, an alien may be unwilling to return home yet unable to demonstrate a well-founded fear of persecution. Moreover, aside from the informal power which may have been retained by the alien's former persecutors, an alien may be unwilling to return to his country of origin for other reasons. The High Commissioner recognized those reasons in the *Handbook*, noting that a change of regime does not always bring about "a change in the attitude of the population, nor in view of his past persecution, in the mind of the refugee."<sup>276</sup>

In short, an alien may be afraid to return home, despite changed conditions, because the sentiment of the population toward him, or people like him, may not have improved, or because, in his own mind, the alien fears returning home due to the suffering he endured there. As noted earlier, the United States Supreme Court in *Cardoza-Fonseca* stated that the High Commissioner's comments in the *Handbook* provide "significant guidance in construing the Protocol,

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272. Interim Dec. No. 3162 (BIA Oct. 16, 1991).

273. 916 F.2d 1257 (7th Cir. 1990).

274. See *supra* note 61 and accompanying text (discussing the two grounds for asylum eligibility).

275. See *supra* notes 82-84, 87 and accompanying text (noting the exceptions to the two standard grounds for asylum eligibility).

276. HANDBOOK, *supra* note 64, at 31 cl. 136.

to which Congress sought to conform."<sup>277</sup> Therefore, as the instruments clearly state and as their interpreters recognize, where an alien has suffered severe persecution, he should not be expected to repatriate.

Because the Seventh Circuit does not deem even prolonged detention and severe physical abuse, such as the beatings with a lead pipe that Chrzascik endured,<sup>278</sup> as past persecution sufficient to form the basis for asylum eligibility, it precludes an alien whose country of origin has experienced a change in conditions from invoking the humanitarian principle which would make him eligible for asylum. By demanding a level of persecution above that which any refugee in the present world could satisfy, as suggested by Judge Posner's position in *Skalak*, the courts violate the humanitarian principle which rightly applies to those refugees who have suffered severe persecution in the past, but who no longer have a well-founded fear of persecution due to changes in their country of origin.

Both the Protocol and the Refugee Act, together with its regulations, contemplate two distinct grounds for asylum eligibility in addition to the humanitarian principle. Thus, in order to comply with the international and domestic obligations of the United States, the Seventh Circuit, other federal circuits, and the BIA should lower the level of past persecution required for asylum eligibility for those who have suffered severe persecution in the past but face little or no likelihood of persecution in the future.<sup>279</sup>

An insurmountable standard for asylum eligibility on the basis of past persecution will have a detrimental effect in today's rapidly

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277. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1986).

278. See *supra* text accompanying note 219 (discussing the decision in *Szzech*, and the beatings involved therein).

279. There is increasing popular support for the proposition that aliens are using requests for asylum as means of gaining entry into the United States. See, e.g., *60 Minutes: How Did He Get Here?* (CBS television broadcast, Mar. 14, 1993) (discussing the reasons associated with Sheik Rahman's presence in the United States and continued presence even after his alleged association with the bombing of the World Trade Center). To avoid allowing the past persecution standard to turn into a revolving door for aliens who lack a well-founded fear of persecution, courts could insist on the introduction of evidence showing that the persecution the alien suffered was so severe as to emotionally scar him. In each case, the judge, based upon this evidence, could decide whether the emotional scar is deep enough such that returning the alien to his country of origin would be inhumane. Similarly, the Attorney General could adopt regulations under § 208(a) of the Refugee Act requiring aliens seeking to rely on past persecution as grounds for asylum to submit evidence showing the effect of past persecution on them. Such evidence could be in the form of expert testimony or affidavits presented to Immigration Judges and others at the administrative level along with the asylum application.

changing world. Many persons who have suffered emotional or physical abuse on account of their race, religion, nationality, membership in a particular social group, or political opinion, may be left without the safe haven asylum provides. Because of changes in the aliens' countries of origin, it is unlikely that courts would find them to have a well-founded fear of persecution. Since it is not likely that any of these aliens have suffered the kind or severity of persecution the German Jews suffered at the hands of the Nazis, they cannot realistically hope to persuade the Seventh Circuit, or other similarly conservative circuits with respect to this issue, that the past persecution they have suffered makes them refugees eligible for asylum.<sup>280</sup>

Today, there are many countries undergoing changes of regimes, governments, and conditions. Under the Protocol and the Refugee Act it is unacceptable to simply determine whether the persecuted peoples of those countries will continue to suffer persecution under the new conditions when evaluating asylum eligibility. The past persecution which the aliens from those countries have already suffered — if severe enough — is sufficient, regardless of changed conditions, to make them eligible for asylum under the authoritative instruments.<sup>281</sup>

Certainly, the administrative and judicial bodies of the United States could follow the Seventh and other circuits<sup>282</sup> and raise the level of persecution required in the absence of a well-founded fear to a level that no one could satisfy. That, however, was not the intent of the Committee who drafted the Convention, nor the intent of Congress when it approved the accession of the United States to the Protocol and when it subsequently passed the Refugee Act. Contrary to the interpretation given to the Refugee Act by the Seventh Circuit and other federal circuits, the Refugee Act "reflects one of the oldest themes in America's history — welcoming homeless refugees to our shores. It gives statutory meaning to our national commitment to human rights and humanitarian concerns."<sup>283</sup> Sadly, refusing eligibility for asylum to those who were beaten, whose homes were invaded, and whose liberties were suspended does not reflect

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280. See *supra* notes 226-27, 262-63 and accompanying text (discussing Judge Posner's quote referring to the experience of Jews in Nazi Germany).

281. See *supra* notes 84-85 and accompanying text (discussing the High Commissioner's observance of the humanitarian principle).

282. See *supra* notes 141-239 and accompanying text (surveying positions taken by the Seventh and other circuits).

283. S. Rep. No. 96-256, 96th Cong., 1st Sess., at 1 (1979).

the "national commitment to human rights and humanitarian concerns"<sup>284</sup> that Congress, in passing the Refugee Act, sought to convey and promote.

Thus, the overall impact of the restrictive view of the past persecution standard is two-fold. First, countless peoples who have suffered persecution have been and will be left ineligible for asylum in the United States. Secondly, the international stature of the United States as a nation that holds human rights in high regard has been and will continue to be tarnished. These phenomena will continue until those interpreting the Refugee Act interpret it consistently with the intent of its drafters and in accordance with the international obligations of the United States under the Protocol.

### CONCLUSION

Ultimately, it is the alien, the asylum-seeker, the refugee, the person behind the labels, who suffers the most. Without a meaningful past persecution standard as envisioned by the drafters of the Refugee Act, by the BIA in *In re Chen*,<sup>285</sup> and by the United Nations, that person may face a return to his country of origin. Such a return may be one to an uncertain future and to disturbing memories of the past.<sup>286</sup>

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284. *Id.*

285. Interim Dec. No. 3104 (BIA Apr. 25, 1989).

286. Estimates indicate that 30-60 percent of refugees are survivors of torture. Antonio Martinez & Mary Fabri, *The Kovler Center: The Dilemma of Revictimization*, 2 TORTURE 47 (1992).

